STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 13, 2009
v	No. 283762 Macomb Circuit Court
MICHAEL LEROY DAVIS, Defendant-Appellant.	LC No. 2006-004839-FH

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm, but remand for resentencing.

I. Basic Facts

The underlying facts of this matter involve the armed robbery of a McDonald's restaurant located in Roseville, Michigan. At approximately 4:30 a.m. on August 7, 2006, defendant allegedly drove his vehicle up to the drive-through and ordered two cheeseburgers. When he pulled-up to the window to pay, he handed the cashier, Angelica Alexander, a $20 bill and then proceeded to pull out a gun. Alexander ran from the window, at which point defendant stood up and reached into the window, pulled the till from the cash register, and removed its contents. The McDonald's manager, Michael Osinski, was in the back of the store when he heard Alexander's screams. Osinski ran to the window as Alexander was running away. By the time Osinski reached the window, defendant was getting back into his car and was proceeding to drive away in a silver Ford Taurus. A bag of some sort was covering the vehicle's license plate. Osinski called the police and, when they arrived, he gave them a copy of the surveillance tape. The tape depicted a man with a gun in one hand emptying the drive-through cashier's till and driving off in a silver Ford Taurus. The tape showed that the car's license plate was obscured and that a permit dangled from the review mirror.

Shortly thereafter a car matching that in the surveillance video was discovered abandoned in a neighborhood. The license plate revealed that the car was registered to Rochelle Byrd. The police questioned Byrd at her residence sometime around 5:30 that same morning. She admitted that the vehicle was hers and stated that the vehicle should have been in front of her house, but

that she did not know where it was and that she could not find her keys. One of the officers showed Byrd photographs of images from the surveillance video and she identified the driver of the car as her husband. Defendant was arrested weeks later, on August 23, 2006, on unrelated charges. Officers found a black handgun with a yellow handle in defendant's possession when he was arrested. Defendant was charged in the present matter and he pleaded not guilty.

Before the matter could proceed to trial, defendant requested that he take a polygraph test. On the day that the test was administered, counsel was not present. However, defendant was read his *Miranda*[1] rights and he signed a form indicating that he understood his rights, that he was voluntarily waiving his right to counsel, and that he was willing to answer any questions. After the test was administered, the examining officer, Michael Suratt, conducted a post-polygraph interview that lasted about 30 to 40 minutes. During this interview, defendant admitted to robbing the McDonald's on August 7, 2006, by pulling a gun on the drive-through attendant and then removing the register's contents.

At trial, which began on December 11, 2007, the trial court held a *Walker*[2] hearing, during which defendant denied that he had confessed to the crime. The trial court, however, permitted Suratt to testify regarding defendant's admissions. Thereafter, the trial concluded and the jury returned a guilty verdict on all counts. The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to 30 to 60 years' in prison for the armed robbery conviction, 30 to 60 years' in prison for the felon in possession conviction, and two years' in prison for the felony-firearm conviction. The court also assessed attorney fees against defendant in the amount of $2,825, based on the fact that defendant had earned about $1,000 per week working odd jobs. This appeal followed.

II. Post-Polygraph Confession

Defendant first argues that statements he made after the polygraph examination were admitted into evidence in violation of his Fifth Amendment rights. We disagree. In reviewing a trial court's determination regarding the voluntariness of a confession, we consider the entire record de novo. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). We will not disturb the trial court's factual findings as to whether the wavier of *Miranda* rights was knowing and voluntary unless clearly erroneous. *Id*.

The federal and Michigan Constitutions guarantee that no person shall be made to be a witness against himself at a criminal trial. "[This] privilege has been extended beyond criminal trial proceedings 'to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.'" *People v Honeyman*, 215 Mich App 687, 694; 546 NW2d 719 (1996) (citation omitted). Thus, when a defendant is in custody and is subjected to questioning, "[h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

appointed for him prior to any questioning if he so desires." *Daoud*, *supra* at 633 (citation omitted).

A defendant, however, may waive these rights if he does so knowingly, voluntarily, and intelligently, *id*., and any statements he makes may be used against him. A waiver is valid "if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension . . . .'" *Id*. (citation omitted). Once a defendant has asserted an effective waiver, "failure to reread a defendant's *Miranda* rights prior to each interrogation does not render his subsequent statements inadmissible as evidence against him." *People v Godboldo*, 158 Mich App 603, 607; 405 NW2d 114 (1986). Rather, with respect to subsequent questioning, the relevant inquiry is whether the statements were knowing and voluntary. *Id*.; *People v Ray*, 431 Mich 260, 268; 430 NW2d 626 (1988).

At the outset, we first note that there was no question of voluntariness for the trial court to resolve because, at the *Walker* hearing, defendant denied ever making the incriminatory remarks. As such, the relevant question was whether the statement was ever made, not whether it was voluntary. This was a question of fact for the jury to decide, *People v Washington*, 4 Mich App 453, 455; 145 NW2d 292 (1966), and therefore defendant's argument fails for this reason alone. Despite defendant's testimony and our conclusion, we nonetheless consider defendant's arguments.

Here, there is no dispute that defendant voluntarily and intelligently waived his *Miranda* rights during the pre-interview with the examining officer and that his waiver applied during the polygraph exam. The only contention on appeal is that defendant's waiver had expired by the time the examining officer engaged defendant in a post-polygraph conversation, such that his statements were no longer knowing and voluntary. There is no merit to defendant's position. In this case, defendant himself specifically requested that he be administered a polygraph examination and there is no allegation that he wished counsel to be present during the interview. Before the test was administered, the examining officer read defendant his *Miranda* rights, defendant individually read his rights, and defendant signed a form acknowledging that he understood those rights and that he was voluntarily waiving those rights. Significantly, the waiver's language did not expressly limit the waiver to the polygraph exam; rather, it referred to "questioning" generally and thus extended to the post-interview phase. The waiver language also explicitly stated, "*Anything you say* can be used against you . . . ." Further, while it is unclear from the record how much time elapsed between the pre-interview and the post-interview, the examining officer testified that all three parts of the interview occurred continuously in time, without a break. In addition, the same examining officer conducted all parts of the interview. Under these circumstances, it was not reasonable for defendant to expect a rewarning of his rights after the conclusion of the polygraph examination. Thus, there is no question in our view, that defendant's waiver, which he concedes was knowingly and voluntarily given, applied throughout the entire interview, including that part that occurred after the polygraph exam.

III. Ineffective Assistance of Counsel

Defendant next argues that trial counsel was ineffective for "unreasonably abandoning" defendant to police interrogation without the presence of counsel and for not crafting an agreement with the prosecutor that there would be no post-polygraph interview or that any

incriminating statements would be inadmissible. We cannot agree. A claim of ineffective assistance of counsel is a mixed question of fact and law that we review de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008). "[B]ecause the trial court did not hold an evidentiary hearing, our review is limited to [mistakes apparent] on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To establish ineffective assistance of counsel, a defendant must show that: "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). In conducting our review, we must not substitute our "judgment for that of counsel regarding matters of trial strategy, nor make[] an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Assuming, without deciding, that counsel's performance fell below an objective standard of reasonableness, defendant cannot establish that the outcome of the proceedings would have been different had the alleged deficient performance not occurred. Stated differently, had the confession not been admitted into evidence, there is no reasonable probability that the result would have been different given the overwhelming evidence of defendant's guilt presented during trial. During those proceedings, the jury was shown the surveillance video of the robbery, which depicted a man in a silver Taurus, pulling out a gun and emptying the cash register at the McDonald's. That same silver Taurus belonged to defendant's wife, Byrd, who testified that she was home sleeping at the time of the crime. Byrd further testified that on that morning, police officers came to her house to question her about her vehicle and that she identified defendant in a surveillance photo that was shown to her. Alexander testified that the gun defendant allegedly used was black with a yellow handle. When defendant was arrested, a gun matching that description was recovered. Finally, Alexander also identified defendant as the perpetuator during trial. In light of this evidence, it is plain that defendant was not convicted on the basis of his confession alone. Thus, because defendant cannot show that he was prejudiced due to the alleged errors, we conclude that his claim for ineffective assistance fails.

IV. Attorney Fees

Defendant also contends that the trial court abused its discretion by ordering defendant to pay $2,825 in attorney fees. Specifically, defendant argues that his due process rights were violated because the court failed to articulate that it had considered defendant's ability to pay now and in the future before ordering reimbursement. We disagree. Our Supreme Court recently held that criminal defendants do not "have a constitutional right to an assessment of their ability to pay before the imposition of a fee for a court-appointed attorney." *People v*

Jackson, 483 Mich 271, 290; 769 NW2d 630 (2009). Thus, defendant's argument is without support in the law and, accordingly, it fails.[3]

V. Sentencing

Defendant next asserts, and the prosecution concedes, that the trial court erred by sentencing defendant above the sentencing guidelines for his felon in possession conviction without stating reasons on the record for its departure. We agree. At sentencing, the trial court sentenced defendant to 30 to 60 years' imprisonment for felon in possession. This sentence exceeds the sentencing guidelines range of 12 to 48 months. Because the trial court did not state on the record its reasons for departure, we conclude that resentencing for defendant's felon in possession conviction is necessary. See *People v Babcock*, 469 Mich 247, 256-257; 666 NW2d 231 (2003).

VI. Standard 4 Brief

Defendant raises a number of additional issues in his Standard 4 Brief. Specifically, defendant contends that reversal of his convictions is necessary because the 180-day rule was violated, his due process rights were violated because an in-court identification should have been suppressed, and counsel was ineffective. We consider each of these arguments in turn.

A. 180-Day Rule

Defendant first argues that he was not told that he was waiving his rights under the 180-day rule, and therefore, any waiver was invalid. According to defendant, he had only waived his right to a speedy trial, not the 180-day rule, and therefore the trial court was without jurisdiction. We disagree. We review de novo whether a defendant's right to a speedy trial under the 180-day rule has been violated. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

Our review of the record clearly shows that defendant definitively waived his right to the 180-day rule on March 8, 2007. On that day, defendant waived his rights in order to have a competency evaluation. He acknowledged, on the record, that he had discussed the need for a forensics examination[4] with defense counsel and agreed to it, and furthermore, he stated that he understood his right to be brought to trial within 180 days and that he understood that he was waiving that right. Because defendant's statements on the record reflect an intentional relinquishment of a known right, it sufficiently effected a wavier. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Thus, there is no merit to defendant's argument that he did not waive the 180-day rule and that the trial court lacked jurisdiction.

---

[3] Of course, our determination of this matter does not preclude defendant from contesting the fee once enforcement action begins. *Jackson*, *supra* at 293-294.

[4] Defendant argues that there was "no factual basis" for the forensic examination and that it was a ploy to deprive him of his rights. In requesting the examination, however, defense counsel indicated that it was in response to defendant's adamant refusal to take a plea agreement, in light of the strength of the prosecution's case. Under the plea agreement, assuming the trial court accepted it, defendant would have served 22 years less than his current sentence.

B. In-Court Identification

Defendant next argues that he was denied due process of law because Alexander was permitted to identify him in-court during her testimony, only after the police had allegedly unduly suggested that defendant was the perpetrator in an out of court photo line-up and after Alexander had observed defendant in open court. We disagree. We will not reverse a trial court's decision to admit identification evidence unless it is clearly erroneous. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004).

An unduly suggestive pretrial identification procedure requires suppression of in-court identification. This is only the case, however, if no independent basis exists for the witness' in-court identification. *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000). A court should consider numerous factors when determining whether an independent basis exists, including:

> (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant. [*People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).]

Assuming, without deciding, that the pretrial identification was somehow tainted, Alexander's testimony identifying defendant was nonetheless proper. In other words, an independent basis existed that permitted Alexander's in-court identification. Alexander had an opportunity to observe defendant when he drove his vehicle up to the drive-through window and was only "about a foot" away. Although she observed him for a brief moment, her description of defendant and the handgun he held corresponded to the person depicted on the surveillance video. In addition, the handgun matching the description that Alexander provided was found near defendant's person when he was finally arrested. Accordingly, defendant's due process rights were not violated when Alexander testified as to defendant's identity.

C. Ineffective Assistance

Lastly, defendant contends that trial counsel was ineffective for failing to move to suppress the gun. We disagree. Our review of the record shows that counsel made a strategic choice and stipulated the admission of the gun so that the jury would not learn that the gun had been found when defendant was arrested on carjacking charges. Decisions regarding what evidence to present are matters of trial strategy, *People v Horn*, 279 Mich App 31, 39; ___ NW2d ___ (2008), and this Court will not substitute its judgment for that of counsel's in such matters, *Matuszak*, *supra* at 58. That a chosen strategy may have contributed to a guilty verdict or otherwise "ultimately failed does not constitute ineffective assistance of counsel." *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Thus, defendant has not overcome the presumption that counsel's decision constituted sound strategy. *Solmonson*, *supra* at 663. Defendant's argument is without merit.

Affirmed, but remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald